



...the exercise of discretion in ordering a TPA is “predicated on the principal’s identification of actual, and not speculative, issues relating to the teacher’s performance”



Court Upholds Limits on Principal’s Discretion to Conduct Teacher Performance Appraisals

In *Greater Essex County District School Board v. Elementary Teachers’ Federation of Ontario*, the Ontario Divisional Court recently upheld an arbitration award limiting the discretion of a principal to conduct a teacher performance appraisal (“TPA”).

The case involved a teacher who, despite having undergone two satisfactory TPA’s in his first year of teaching, was required to undergo a third in the first semester of the following year because he had been assigned to teach at a different school. The Union grieved, arguing the *Education Act* (“Act”) and Regulation 99/02 (“Regulation”) did not allow for such third TPA.

The School Board had relied on provisions in the *Act* and the *Regulation*, as well as in the Ministry’s Teacher Performance Appraisal Manual (the “Manual”), all of which appeared to provide it with a broad discretion when administering TPA’s. For instance, in addition to the requirement under s. 277.29(1) of the *Act* that new teachers undergo two TPA’s in their first 12 months of teaching, s. 277.29(4) provides for further performance reviews at such intervals as the principal considers appropriate, subject to “*the requirements [of the Act] or any regulation, guideline, rule or policy under it*”. As for the *Regulation*, although s. 4 provides for a five year evaluation cycle, s. 5(2) grants discretion to conduct appraisals “*at such intervals as the Principal considers appropriate*”. Further, s 6(1) grants discretion to conduct additional appraisals if the principal considers it “*advisable to do so in light of circumstances relating to a teacher’s performance*”. Similarly, the *Manual* also contains provisions suggesting a substantial discretion.

The arbitrator held that s. 5(2) of the *Regulation* provides discretion in relation to the interval between TPA’s but not in regard to additional appraisals, except in cases where there are issues with a teacher’s performance. He stated the exercise of such discretion is not intended to be used as a form of professional development, nor is it to be used simply when a principal thinks it is a good idea to implement a review. Rather, the arbitrator stated the exercise of discretion in ordering a TPA is “*predicated on the principal’s identification of actual, and not speculative, issues relating to the teacher’s performance.*” As for s. 6(1) of the *Regulation*, the arbitrator acknowledged the



teacher's transfer to a new school might affect his performance but stated any such performance issues were purely speculative when the decision to require a third TPA was made. The arbitrator held there is no discretion to conduct an additional TPA in a situation where a teacher already had been evaluated twice without exhibiting any performance issues. Further, while noting the School Board had relied on the *Manual* in good faith, the arbitrator stated its general language “*must give way to the specific provisions of the legislation*”. Accordingly, he declared the third TPA null and void.

The School Board applied for judicial review, arguing the discretion to conduct TPA's is unfettered. However, the Divisional Court dismissed the application, stating the arbitrator's interpretation of the *Regulation* was “*justifiable, transparent and intelligible*” and “*within the range of acceptable outcomes based on the facts and the law*”. The Court stated that even though the *Manual* left the impression the discretion to conduct TPA's was unfettered and further, despite the fact the parties appeared to have previously operated under that impression, “*the Manual could not replace the intention of the legislature as expressed in the legislation and regulations that [the Arbitrator] was required to interpret.*”

Implications of this Decision

This case reinforces the importance of examining the underlying purposes of a protocol or process. As well, it provides a note of caution – i.e., a Ministry issued document, such as the *Manual*, will be of little value if it is found to be non-compliant with the specific requirements of the legislation. It is thus important for school boards to be very familiar with the specific requirements of the relevant legislation, as well as its purpose and intent, in order to ensure their practices comply.

The Human Resources lawyers at Evans, Philp LLP have extensive expertise and experience in dealing with all manner of employment and labour relations matters. We regularly provide advice and representation to employers on a broad range of issues, including matters involving collective agreements, employment contracts, workplace legislation (including but not limited to the Employment Standards Act and the Occupational Health and Safety Act), disability management, matters under the Human Rights Code, risk management and so on.

If you would like more information, please contact a member of our Management Labour and Employment Law Practice